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JULY 9, 98

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Miavana Wholesale Co. Inc.**

Serial No. 74/**688,234**

Angel Castillo, Jr. of Castillo, Stafford & Wald for Miavana
Wholesale Co. Inc.

Mitchell Front, Trademark Examining Attorney, Law Office 101
(R. Ellsworth Williams, Managing Attorney)

Before Seeherman, Quinn and Hohein, Administrative Trademark
Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Miavana Wholesale Co. Inc. has appealed from the final
refusal of the Trademark Examining Attorney to register the
mark BATEY for canned vegetables, dried beans, fruit drinks
and non-alcoholic malt based beverage, namely malta.¹

Registration has been finally refused pursuant to Section
2(e)(4) of the Trademark Act, 15 U.S.C. 1052(e)(4), on the

¹ Application Serial No. 74/688,234, filed June 7, 1995,
asserting a bona fide intention to use the mark in commerce.

ground that the applied-for mark is primarily merely a surname.

Applicant and the Examining Attorney have filed briefs.² An oral hearing was not requested.

In support of the surname refusal the Examining Attorney has made of record excerpts from the PHONEDISC U.S.A. database, which contains material gathered from address lists and telephone directories. The excerpt indicates that a total of 987 listings for the name BATEY were found in the database; of these, approximately 200 were printed. The print-out shows listings from all across the United States, including Alabama, Arizona, California, Delaware, Florida, Illinois, Kentucky, New Hampshire, New York, Ohio, Texas and Utah.

Applicant argues that the 987 listings shown by the PHONEDICS U.S.A. report, out of the 260 million residents of the United States, are statistically insignificant and that they actually demonstrate that BATEY is an exceedingly rare

² With its brief applicant submitted certain exhibits, namely, a page from the Miami telephone directory, an article from "The Miami Herald" and a printout from the "Encarta" CD ROM Encyclopedia and "The Grolier Multimedia Encyclopedia." The Examining Attorney objected to the consideration of these materials because they were not properly of record. The Examining Attorney is correct that the record in the application should be complete prior to the filing of an appeal, and that the Board will ordinarily not consider additional evidence after the appeal is filed. Trademark Rule 2.142(d). Accordingly, we have not considered the telephone directory excerpt or newspaper article. However, the Board does take judicial notice of encyclopedia entries, and in this case we have considered the information regarding U.S. and Miami population information.

surname in the United States. The question is not, however, how many times a surname might appear in telephone directories; rather, it is whether the primary significance of BATEY to consumers is that of a surname.

In this case, while BATEY is certainly not as common a surname as Smith or Jones, the fact that it is the surname of people located all over the United States shows that consumers throughout the country have been exposed to it, and will regard it as a surname. Thus, the Examining Attorney has met the Office's burden of demonstrating, prima facie, that BATEY is primarily merely a surname. See **In re Etablissements Darty et Fils**, 759 F.2d 15, 225 USPQ 652 (Fed. Cir. 1985).

To rebut the Office's evidence, applicant has argued that BATEY has another, non-surname meaning in the Spanish language. Applicant has provided the following translations of "batey" taken from three English-Spanish/Spanish-English dictionaries:

(Cuba) sugar mill town
Appleton's New Cuyás Dictionary, © 1972

(Cuba) premises of a sugar refinery;
(P.R.) front yard
Follett World-Wide Spanish Dictionary,
© 1966.

(Ant) clearing in front of a country
house, forecourt
Collins Spanish-English English-Spanish
Dictionary, © 1971.

Applicant has also submitted excerpts from the books Historia de la Isla de Cuba (History of the Island of Cuba) by Carlos and Manuel Marquez Sterling, and Exposicione de Esculturas de los Indios Tainos (Exposition of Sculptures of the Taino Indians), a publication of the Centro de Estudios Avanzados de Puerto Rico y El Caribe in Puerto Rico. Although these publications are in Spanish, applicant has translated portions of the excerpts in its response, indicating that "batey" was the name of a ball game of the Tainos of the Greater Antilles as well as the Tainos' term for a land clearing in which they held great festivals and played a ball game.

Applicant asserts that it intends to use BATEY "to identify its food and beverage products aimed primarily at Spanish-speaking consumers throughout the United States, including in predominantly Hispanic Miami, Florida, and Puerto Rico." Brief, p. 9. It contends that "to the sixty percent of Miami's and almost half of Dade Country's residents who are Hispanic, and to the approximately 22-million residents of the United States who are Hispanic," brief, p. 10, BATEY will be perceived as a Spanish word rather than a surname.

There are two problems with applicant's argument. First, there is nothing in applicant's identification of goods which would restrict its sales to Miami, to Dade

County where Miami is located, or to the residents of the United States who are Hispanic. English-speaking people, as well Spanish-speaking people, are likely to purchase such items as canned vegetables, dried beans and fruit drinks. Thus, we must deem the purchasing public for applicant's goods to include the general public, not merely those members of it who are Hispanic.

Second, and perhaps more importantly, applicant has not demonstrated that, even among Spanish-speaking people in the United States, a significant number would recognize that BATEY has a non-surname meaning. Two of the dictionaries indicate that "batey" has the meaning, in Cuba, of the premises of a sugar refinery or a sugar mill town, while another dictionary states that in the Antilles it means the clearing in front of a country house. There is only one dictionary listing which indicates that "batey" has a meaning within the territory of the United States: the "Follett" dictionary lists "front yard" as a meaning of the word in Puerto Rico.

Moreover, the Examining Attorney has made of record two Spanish-English English-Spanish dictionaries in which the word "batey" does not even appear. Although applicant characterizes them as pocketbook dictionaries, the Webster's dictionary describes itself as a "comprehensive bilingual dictionary" and the Cassell's dictionary indicates it

contains over 45,000 entries and "includes everyday conversational language, and technical and professional terms." The Board also takes judicial notice that "batey" does not appear in the Random House Latin-American Spanish Dictionary, © 1997, despite the fact that "[t]he aim of this dictionary is to cover as much current vocabulary as possible, as well as certain items found in standard works of Modern Spanish and English literature"; The Concise American Heritage Larousse Spanish Dictionary, © 1989; or Hamel's Bilingual Dictionary of Mexican Spanish, 2d ed. 1996, although this volume contains "more than 6,000 entries" and "includes all entries listed in the Spanish Royal Academy Dictionary pertaining to Mexico." The only dictionary we have found, other than those submitted by applicant, in which "batey" appears at all is Cassell's Spanish-English English-Spanish Dictionary, © 1978, which it is listed as meaning, in Cuba, "central complex on sugar plantation."

As for the evidence that to the Taino Indians "batey" was the name of a ball game or the clearing where this game was played, the Examining Attorney has pointed out, and applicant has conceded, the Taino Indians were a pre-Columbian group of people living in the West Indies, and who are "long-extinct." Applicant's brief, p. 11. The very manner in which the Spanish-language books on the Tainos

depict this term (in italics, followed by a definition) show that the term would not be readily known to the average Spanish-speaking person. The fact that scholars or others who have studied these Indians may have been exposed to the word is not a sufficient basis to find that the purchasing public would regard BATEY as not primarily merely a surname.

In **Ex parte Reeves Brothers, Inc.**, 84 USPQ 19 (Com'r. Pats. 1949), the Commissioner held that REEVES was primarily merely a surname despite the fact that dictionary definitions of "reeve" include, inter alia, "passing a rope through a block," an historical reference to a law officer, and "the female equivalent of a ruff." "The fact that other meanings may exist does not necessarily indicate that a word would ordinarily have other than its primary meaning, and the fact that lexicographers or others might recognize a possible unusual meaning is not controlling."

Similarly, the fact that "batey" may have a meaning in Cuba, the Antilles or Puerto Rico, or may have an historical connotation to those studying the Taino Indians does not detract from primary significance of BATEY as a surname to the purchasing public.

Applicant has also pointed to the fact that the Bacardi Corporation had previously owned registrations for BATEY, and that the computerized records on these registrations included a translation statement that BATEY is "a central

complex on a sugar plantation." These registrations were both cancelled for failure to file Section 8 affidavits of use, and the Examining Attorney indicates that he was unable to obtain the files, so we cannot determine why the translation statements were entered. However, we do not view the inclusion of the statements as a prior determination by the Office that BATEY is not primarily merely a surname. First of all, a decision by an Examining Attorney in connection with another application is not binding on the Board, which must consider registrability based on the record in the particular case. More importantly, we note that both of these registrations were issued on the Supplemental Register, which would be consistent with a finding that BATEY is primarily merely a surname.

We have also considered applicant's statement that the state of Florida has issued a "certificate of allowance of reservation of name BATEY for proposed Florida state trademark registration." A decision by the state of Florida to issue a state registration has no bearing on the determination of registrability by the Patent and Trademark Office, which must follow federal law in this matter.

In short, the evidence submitted by applicant is insufficient to show that, to a significant number of the purchasing public in the United States, BATEY has a

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non-surname meaning. Accordingly, applicant has failed to rebut the prima facie case presented by the Examining Attorney.

Decision: The refusal of registration is affirmed.

E. J. Seeherman

T. J. Quinn

G. D. Hohein
Administrative Trademark Judges
Trademark Trial and Appeal Board